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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1183

CARBON FUEL COMPANY, *Petitioner*,

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT 17, UNITED MINE WORKERS OF AMERICA; and LOCAL UNIONS NOS. 6572, 7626 and 2236, UNITED MINE WORKERS OF AMERICA, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

I. QUESTIONS PRESENTED

1. Do the collective bargaining agreements between the coal industry and the United Mine Workers of America impose upon the latter an implied duty to discipline local union members, the "breach" of which renders the UMWA liable in damages for their wildcat strikes?[1]

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[1] The casting of the issue in terms of "reasonable steps" or "best efforts" to prevent or end strikes, as it is repeatedly characterized by Petitioner and the *Amici* supporting it, is inaccurate and misleading, inasmuch as those parties do not point to any specific steps which either the International or the District should have taken other than invoking disciplinary procedures. See pp. 40-41, *infra*.

2. Is the implication of such a duty consonant with the national labor policy favoring free collective bargaining and demanding non-interference by employers in internal union affairs?

II. STATEMENT

This action was brought by Petitioner Carbon Fuel Company ("Carbon") against the International, United Mine Workers of America, its District 17 and three of its Local Unions as a result of approximately 48 work stoppages which occurred in the years 1969 through 1973 at Carbon's coal mines in West Virginia. Inasmuch as this case involves the liability of the International Union and its District 17, they will be referred to hereinafter as "UMWA" unless the context denotes otherwise; and the entire United Mine Workers of America organization will be referred to hereinafter as the "Union." The only requested relief still pertinent is the demand by Carbon for damages. Jurisdiction was based upon Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 (A. 4).[2]

Carbon is a coal producer, which operates approximately 15 mines primarily in Kanawha and Boone Counties, West Virginia (A. 19-21). In 1969-1973, it produced an average of about 2,200,000 tons of coal annually (A. 23). It is a member of the Bituminous Coal Operators Association which is a national association of coal producers that acts as their principal bargaining agent in negotiations with the UMWA (A. 20, 27-28).

The Union is a three-tiered organization, consisting of approximately 1,300 Local Unions, 23 Districts, and the International Union. The main function of the International Union is to negotiate national coal wage agreements (A. 28). The Districts negotiate memoranda of understanding with coal companies relating to seniority, holidays and working conditions, and handle grievances which are not settled at the local level.[3] The Locals elect their own officers and conduct the day-to-day affairs of the Union at each mine.

The UMWA has no role in the hiring of miners. Men desiring work approach the coal company directly; there is no hiring hall arrangement in the coal industry. Once a miner is hired, he becomes a member of the Union (A. 40-42).

1. The Practice of the United Mine Workers of America Concerning "Wildcat" Strikes.

Each of the work stoppages involved was what is commonly known as a "wildcat" strike. Insofar as is relevant to the issues before this Court, the germane facts were essentially undisputed. None of the stoppages was called, supported or condoned by the UMWA (A. 46-47). Nor was the UMWA involved in the planning of, or otherwise a participant in, the stoppages; nor did it ratify any of the stoppages (A. 44-45). The role of the UMWA[4] with respect to these stoppages was as follows:

When a wildcat strike occurred, the offices of District 17 would be advised by telephone by the Kanawha Coal Operators Association, and by the Local Union, usually on the

[2] The Appendix hereinafter will be referred to as "A." The trial transcript will be referred to as "Tr."

[3] A description of the Union's structure and the role of its various levels appears in *Hodgson* v. *UMWA*, 344 F. Supp. 17, 20 (D.D.C. 1972), and *Hodgson* v. *UMWA*, 344 F. Supp. 990, 993-994 (D.D.C. 1972), *affirmed sub nom, Brennan* v. *UMWA*, 475 F.2d 1293 (D.C. Cir. 1973). District 17 alone has approximately 101 Local Unions (A. 72).

[4] For a substantial part of the period involved, District 17 was under a trusteeship of the International Union.

day that the stoppage occurred (A. 98-99). The District would confer by telephone with officers of the Local, to determine whether they believed that they could persuade the miners to return to work promptly. If it was considered that they could not, or their efforts were not successful, the District sent a representative to meet with the miners (A. 64-7, 76, 78, 80, 84, 85, 89, 103, 108).

At those meetings, the District representative would seek to ascertain the cause of the stoppage, so that it could be taken up with management. He also invariably would order the miners back to work, informing them that the strike was unauthorized, and against Union policy. The miners also were informed that the continuation of the strike could result in the issuance of injunctions by the courts, of possible contempt citations, and possible discipline (A. 82, 86, 99, 104, 116). When the underlying dispute could be submitted to the grievance procedure under existing collective bargaining agreements, the miners were so advised (A. 78, 104, 110).

In most cases, this process resulted in the prompt return of the miners to work. In 22 of the 32 strikes (69%) now in issue,[5] the strike lasted only 1 to 2 days. If the strike did not end after the first meeting, it was the standard practice for the District Representative to call another meeting with the miners and again order them back to work; and to repeat this process daily until the strike could be

[5] Those stoppages which were "sympathy strikes" were not actionable under the ruling in *Buffalo Forge Co.* v. *United Steelworkers of America*, 428 U.S. 397 (1976), as the Court below held. 582 F.2d at 1348. There were 16 such strikes; there is apparently a mathematical error in the opinion below. *Ibid.* Data concerning the strikes are summarized in Exhibit "A" to the Brief of Respondents in the Court of Appeals, which in turn is based on data in Tr. 233-304. The miners were working in three shifts each day and each "day" in the above figures equals three shifts rather than a calendar day.

brought to an end. In 30 of the 32 occasions at issue, the strike ended in no more than 4 days. The remaining 2 strikes lasted 5 or 6 days each. UMWA President Miller and the District 17 Presidents testified that the long-standing Union position, conveyed to its members, was that wildcat strikes were detrimental to the interests of the Union, the miners and the public and that ending them was their "first priority" (A. 66, 90, 117-120, 126).[6] The UMWA efforts to terminate these strikes were in good faith; no evidence to the contrary was presented at trial.

Likewise, Carbon presented no evidence to support its basic factual theory and assertion that instituting disciplinary proceedings would bring aggrieved coal miners back to work faster than the practices the UMWA does follow, or avoid strikes, in ways which neither the employer's own disciplinary powers, nor the contempt powers of the Courts, could accomplish. To the contrary, several UMWA witnesses, on the basis of long experience in coal mining, testified that any such attempt by the International to impose discipline would be counterproductive and aggravate wildcat strike situations (A. 79, 87, 93, 116, 117, 120). UMWA President Miller testified that in his own experience, on an occasion in the 1950's, the International had threatened to revoke the charter of the UMWA Local of which he was a member, because of a wildcat strike the International was told by the local members that it was free to take the charter. In these circumstances the membership was inflamed and the strike proved to be a protracted one (A. 119-120).[7]

[6] Within the memory of a long-time President of District 17, on only one occasion did a District Representative fail to comply strictly with this procedure. He was fired (A. 70).

[7] A recent study for a Congressional agency provides a unique insight into the causes of long-standing labor-management unrest in the coal fields, including wildcat strikes. U. S. Congress, Office of Technology Assessment, *The Direct Use Of Coal* (1979). Four

2. The Collective Bargaining Agreements and Their History.

Union liability for wildcat strikes has been a specific subject of bargaining between the UMWA International and the coal industry. Two principal types of clauses are pertinent: those related to settlement of disputes without strikes, and those related to the parties' taking disciplinary measures against those who violated the contract. The bargaining history features deliberate deletions of both no-strike clauses and clauses concerning the use of "best efforts" through disciplinary measures, and successive readoptions of contract language which excluded any such express obligations.

Prior to 1947, the agreements contained express and rather broad no-strike obligations.[8] That language was ex-

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factors are principally responsible: long-term economic conditions in the coal market including extended periods of demand stagnation; the unique nature of the underground work place and the work process itself; the social environment in the coal fields; and "the past", attitudes which each new generation of miners learns from the previous generation. *Id.* at 127-29, 135-36, 145, 396. The report concludes that wildcat strikes "have always been a part of coal mining and may never be eliminated . . . Harsh legal penalties against strikers do not seem to deter wildcat strikes in this industry." *Id.* at 22.

Dix, *Work Relations in the Coal Industry, The Hand-Loading Era, 1880-1930* (Institute for Labor Studies, West Virginia University—1977), concludes:

> "The local work stoppage, so common in the industry today, can be traced back to the efforts of mine workers to protect their autonomy and their incomes even before the turn of the century."

Id., 569.

[8] In pertinent part the pre-1947 contracts read as follows:

Illegal Suspension of Work

A strike or stoppage of work on the part of the Mine

cised by the parties "to remove the danger that the union might be sued for breach of contract under the new statute [the Taft-Hartley Act]." *International Union, UMWA* v. *NLRB,* 257 F.2d 211, 216 (D.C. Cir. 1958). Since 1947, there have been no express no-strike obligations in any agreement, including the 1968 and 1971 agreements which were in effect when the wildcat strikes involved in this case occurred. Both before and after 1947, and to the present, the agreements have provided for the amicable resolution of disputes through a grievance procedure. (A. 137, 141-42, 145, 148-49, 154-55, 166-67, 170-71, 175-76, 182-83.

Especially significant in this case, in which the coal industry is attempting to have the Courts create a union duty to discipline, is the bargaining history directed precisely to disciplinary provisions. In the 1950 agreement only, there was a provision for both parties, the UMWA and the industry, "to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement." 257 F.2d at 216. This language was eliminated (and the related clauses amended) in 1952, "because it laid [the UMWA] open to criticism for the measures which they took, or did not take, in disciplining locals or members who engaged in unauthorized stoppages." *Id.* at 216-17. In 1952 and thereafter, the agreements have contained the following Section (A. 160):

> Workers shall be a violation of this Agreement. Under no circumstances shall the Operator discuss the matter under dispute with the Mine Committee or any representative of the United Mine Workers of America during suspension of work in violation of this Agreement.

(A. 137, 142).

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the "Settlement of Local and District Disputes" Section of this Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the Industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the Courts."

The judicial decisions which followed most closely upon the adoption of this language, against the backdrop of this bargaining history, squarely rejected industry contentions that the UMWA could be held liable for unauthorized wildcat strikes. *E.g., United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 877-78 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955); *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 351 (6th Cir. 1958), *affirmed in part by evenly divided court,* and *modified in part on other grounds,* 361 U.S. 459 (1960); *cf. International Union, UMWA* v. *NLRB,* 257 F.2d 211 (D.C. Cir. 1958).

In the light of both the bargaining history and these judicial determinations of non-liability, the industry and the UMWA repeatedly re-adopted without change the relevant clauses as they had been revised in 1952. *See* A. 161-162 (1955 Agreement); A. 162-163 (1956 Agreement); A. 163-164 (1958 Agreement); A. 165 (1964 Agreement); A. 168-169 (1966 Agreement); A. 178 (1968 Agreement); and A. 179, 186-187 (1971 Agreement).

III. PROCEEDINGS BELOW

At trial, the evidence showed, without serious dispute, that District 17 and the International had not started,

condoned, supported or ratified the work stoppages in question, and had tried to stop them, with considerable success. The stoppages occurred for a great variety of reasons, some subject to grievance procedures, and others not: to register support of black lung and coal mine safety legislation; to protest discharge of a fellow employee; to complain of misconduct by a foreman, or unsafe working conditions, or the failure to post jobs fairly; to protest the ousting of Anthony Boyle as UMWA President; and to complain about the administration of the Welfare Fund.

The Union also attempted to present a defense that Carbon, as a matter of deliberate company policy, would not process grievances at the first two of the five contractual steps at the mine site, thereby forcing any miner who wished to pursue issues of safety or job rights to proceed to the District level; and that to the extent settlements were made at the first two steps, Carbon refused to honor them. Although the UMWA was permitted to argue that in particular disputes Carbon had refused to process grievances, it was not permitted to argue that the grievance procedure was not invoked because of the general policy of Carbon's frustrating and impeding the grievance machinery (Tr. 743, 1077-1083).

After denying the Defendants' motion for a directed verdict, the District Court instructed the jury, *inter alia,* that the International and the District could be liable "[i]f you find from a preponderance of the evidence that the International and District Unions did not use all of the reasonable means available to them to prevent work stoppages or strikes from occurring in violation of the contract, or to terminate any such work stoppages or strikes after they began . . ." (A. 197).

It further instructed the jury that the District and International could be held liable for work stoppages engaged

in by the local unions "while they were acting as agents for District 17 and/or the International, either within the scope of their authority . . ." (A. 197-198). The District Court's instructions added that such agency could be established by "indirect or circumstantial evidence," and then pointed out Carbon's contention that the International Union and District 17 "through their contract and Constitution made the local unions their agents for purposes of settling arbitrable disputes" (A. 198). It was added (A. 198-199) that "a union is not responsible for the acts of an agent which are performed directly contrary to orders or directions given the agent unless the union knows the agent is or has been performing those acts and does not reasonably act to prevent the agent from performing them."

As noted, the only evidence produced at trial on which these instructions, given over the Defendants' objections (*see, e.g.,* A. 201-202), purported to be based, was to the effect that unauthorized strikes had occurred; the practice of the UMWA was to call meetings and order the men back to work as described above; and that the only action identified by Carbon which the UMWA did not take was that it did not discipline its members or revoke the charters of locals. As the instructions implied, the only evidence pointed to by Carbon as supposedly raising a question of whether locals acted as "agents" for the UMWA in wildcat strikes was that the International negotiated the collective bargaining agreements, and that the first two steps of the grievance procedure provided in those agreements were at the local level.

The jury returned verdicts totaling $206,547.80 against the International, $242,130.80 against District 17; and $722,347.43 against the three local unions.

The Court of Appeals for the Fourth Circuit affirmed the judgments against the Local Unions, and reversed those against District 17 and the International. 582 F.2d 1346.

The Court ruled that the locals could be held liable for the "mass action" of their members. However, as to the 16 of the 48 stoppages at issue, which were over matters not subject to the grievance procedure, such as "sympathy strikes," the judgments were reversed on the authority of *Buffalo Forge* v. *United Steelworkers,* 428 U.S. 397 (1976). The holdings as to the liability of the local unions, and the liability for strikes over non-grievable matters, have not been brought before this Court by the respective parties.

With respect to the District and International, the Fourth Circuit adhered to its long-standing precedent in *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955), that such entities could not be held liable for wildcat strikes which they did not start, adopt, encourage or prolong. The Fourth Circuit noted (582 F.2d at 1350) that *Haislip* was in accord with the weight of authority, and that the recent contrary position suggested in decisions of the Third Circuit,[9] "in effect, rewrites the terms of the contract upon which the parties had agreed."

IV. SUMMARY OF ARGUMENT

I. It would violate and frustrate the plain intention of the parties for the Court to graft onto their Agreements an implied duty of the UMWA to discipline individual members or local unions that engage in wildcat strikes or to be liable in damages for such strikes. The parties' intention that their contract include no such duty or obligation is demonstrated by the bargaining history. In the 1950 contract, the UMWA and the coal industry agreed "to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent

[9] *Eazor Express, Inc.* v. *International Brotherhood of Teamsters,* 520 F.2d 951 (3rd Cir. 1975); *Republic Steel Corp.* v. *United Mine Workers of America,* 570 F.2d 467 (3rd Cir. 1978).

stoppages of work by strike or lockout pending" the processing of grievances (A. 156-157). In the 1952 amendment to that agreement and in every agreement thereafter, including the 1968 and 1971 agreements involved in this case, the parties limited their commitment by providing only "that they will maintain the integrity of this contract," but deleting the "best efforts" and use of "disciplinary measures" language and thereby eliminating those obligations. The parties' deliberate excision of this language is probative of their intention and agreement not to impose upon the UMWA the liability and duties which the industry is seeking in this case.

When the parties engaged in collective bargaining and executed successive collective bargaining agreements after 1952, including the 1968 and 1971 agreements, they could have had no doubt as to the correct legal interpretation of the pertinent contract language. The Courts had interpreted that language to denote that the UMWA was not liable for stoppages it did not authorize or ratify, and in which it in no way participated (*e.g., United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955) *cert. denied*, 350 U.S. 847 (1955); *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided court and modified in part, on other grounds*, 361 U.S. 459 (1960).[10]

In the light of this conduct by the parties and the contract language to which they have agreed, it would offend normal rules of contract construction to grant the industry

[10] The issue on which this Court divided equally in *Benedict* was whether the absence of a no-strike clause by itself precluded liability for strikes called by the International Union in violation of the provision of the collective bargaining agreement in force from 1950 to 1952, requiring settlement of local disputes through the grievance procedure. The Sixth Circuit's holding that the International is not liable for "wildcat" strikes it did not call was not challenged in this Court.

rights which it did not win in collective bargaining, but rather knowingly and repeatedly surrendered. Indeed, the industry is in fact requesting this Court to superimpose upon the agreements a liability and discipline provision, tantamount to a guarantee against strikes, far broader in scope and more onerous to the UMWA than any provision previously existing between these parties.

II. The national labor policy founded on free collective bargaining likewise commends rejection of Petitioner's attempts to strengthen itself and weaken the UMWA. Such judicial tilting of the scales of relative bargaining strength is proscribed by the many legislative and judicial declarations that the law requires and protects the rights of employees to enjoy the benefits of free collective bargaining by strong and democratic unions which they may join and support. The national labor policy militates against wholesale and improper extensions of union liability or intrusions into internal union affairs at the behest of the employer. That policy sustains the agreements as made and intended by the parties, and forbids Government dictation or addition of terms to the agreements. *E.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970).

Long-established policies would be violated if Carbon's position prevailed. The law clearly establishes the separate existence of members and different labor organizations, locals, districts and internationals, all from each other. Automatic imposition of liability upon the UMWA for the wildcat strikes of members and locals, which the industry here seeks, is thus proscribed.

The UMWA has a general policy against wildcat strikes. They have been denounced and the UMWA not only withholds its authorization, ratification or any support from them but also actively seeks to terminate them when they occur. Active efforts at persuading the employees to return to work have generally been effective. In view of this gen-

eral policy of the UMWA as well as its actions directed against these particular strikes, holding the UMWA liable would be contrary to applicable agency principles.

To require the UMWA to discipline would be an unwarranted intrusion in its internal affairs and would upset the existing balance of bargaining strengths in the coal industry by seriously weakening the UMWA. The concern that such internal union decisions be free of trespass by the employer is demonstrated by the fact that methods for enforcing no-strike clauses are a discretionary, not mandatory, subject of bargaining.

This Court has recently reiterated the concern of the national labor policy that labor organizations not be subjected to new, heavy types of financial liabilities, lest they be rendered incapable of representing the employees effectively. *International Brotherhood of Electrical Workers* v. *Foust*, — U.S. —, 99 S. Ct. 2121 (1979). Moreover, the mandatory discipline which the industry wishes to impose upon the UMWA would sow internal disputes and divisions, loosening if not destroying the bonds of loyalty and confidence which the members have in the UMWA.

In our society, voluntary associations and labor organizations in particular cannot operate by military discipline. To the contrary, democratic rights and processes are assured union members by virtue of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401 et seq. The discipline of any union member must accord with due process requirements under that Act and therefore cannot proceed with the dispatch required to terminate wildcat strikes. There is no reason to believe that discipline of members by the UMWA would be more effective than discipline of employees by the industry, which the industry has apparently eschewed on its own judgment of its own best interest. At the trial Carbon introduced no evidence

that imposing a disciplinary duty upon the UMWA would aid in preventing or terminating wildcat strikes.

If the industry can persuade this Court to deprive the UMWA of the same control over its internal affairs and reactions to wildcat strikes which the industry has and will retain for itself, the unity and strength of the UMWA will be grievously injured. The industry would have received by implication rights comparable to if not broader than those which it did have included in an Agreement decades ago, but which it knowingly bargained away. The industry would have received from the Government a rich advantage in bargaining power in defiance of the national labor policy. This Court should not countenance any such result. Rather, to enforce the Agreements as intended by the parties and in the promotion of that policy, this Court should affirm.

V. ARGUMENT

1. THE COLLECTIVE BARGAINING AGREEMENTS PRECLUDE THE IMPOSITION OF LIABILITY FOR WILDCAT STRIKES UPON THE UMWA FOR FAILURE TO DISCIPLINE MEMBERS OR LOCALS WHO ENGAGE IN WILDCAT STRIKES.

A. The Terms and History of the Pertinent Clauses Preclude the Imposition of Liability or the Implication of a Duty to Discipline.

(1.) The Parties' Intention Not to Impose a Duty of Discipline is Demonstrated by Their Including it in the 1950 Agreement, but Excising that Language in 1952 and Readopting the 1952 Language in Every Agreement Thereafter.

The terms and history of the pertinent clauses of the 1968 and 1971 collective bargaining agreements preclude the imposition upon the UMWA of an implied duty to institute in internal disciplinary proceedings against locals or members who engage in wildcat strikes. The best evidence of the parties' intention is the fact that the 1950 agreement did include a provision that both parties would "exercise

their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in the agreement"; and the parties excluded this language in 1952 and continued to exclude it from every successive agreement, including the 1968 and 1971 agreements pertinent to this case.

By eliminating that language, the parties plainly meant to exclude that duty from the obligations which both parties had previously assumed. The deletion of that language denoted that henceforth neither party would be obligated to discipline anyone who engaged in a stoppage of work, whether by strike or lockout, pending dispute and grievance processing according to the contract.

It would defy the realities of collective bargaining and rewrite history to brand this conduct of the parties as meaningless. The plain truth is that these experienced and sophisticated parties bargained hard with respect to this language and knew precisely what they were doing in 1950 and 1952, and each agreement thereafter. In 1950, they provided in the conjunctive that they intended "to maintain the integrity of this contract *and* to exercise their best efforts through disciplinary measures to prevent stoppages of work" (A. 156-157; emphasis added). Obviously, the contracting parties regarded these as two separate duties, neither being expressed or implied by the other and thus neither gaining legal force without its own express incorporation in the contract. That refutes Carbon's assertions that the parties envisioned that a duty to discipline would or could be implicit in the "maintain the integrity" language.

The deliberate incorporation of the "disciplinary measures" language in 1950 underscores the dispositive significance of its deliberate excision in 1952 and thereafter. To appreciate the significance of the deletion of this language one need only imagine how Carbon would have mobilized it in this litigation had it still appeared in the contract. In short, it is utterly inconceivable that the parties intended to engage or did engage in a series of futile negotiations and agreements with respect to this language, especially the twin futility of incorporating this language in 1950 and then excising it in 1952.

The deliberate excision of a term is to be given effect under settled rules of contract construction. *See, e.g., Royal Indem. Co.* v. *John F. Cawrse Lumber Co.*, 245 F. Supp. 707, 711 (D. Ore. 1965); *Tondevold* v. *Blaine School Dist.*, 91 Wash.2d 632, 590 P.2d 1268, 1270 (1979):

> "The contract between the parties here contained a mandatory retirement provision, . . . When the contract was renegotiated, that provision was not included. The trial court's unchallenged finding of fact was that the BEA had asked the district to delete such a provision and the district's representatives complied. The history of these negotiations compels the conclusion that the parties knowingly abandoned the policy of mandatory retirement."

Also *cf. Klein* v. *Republic Steel Corp.*, 435 F.2d 762, 765-66 (3rd Cir. 1970) ("It is a canon of statutory construction that where as here the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning").

The parties never intended that the "maintain the integrity of this contract" language could carry with it by implication the particular duty to discipline those violating the contract which they had expressly included as a separate and discreet obligation in an earlier contract.[11] That lan-

[11] Other portions of the relevant contract clause show that certainly the parties never intended that any such duty could be imposed as an automatic obligation upon the International Union in every wildcat strike or series of strikes throughout the nation.

guage is not thus deprived of significance. It expresses, for example, the intention of the parties to refrain from actions which might frustrate or undermine the grievance procedures of the contract, such as, by not participating in them with a good faith desire to settle disputes as constructively and expeditiously as possible. A duty to refrain from certain actions is scarcely to be interpreted as an affirmative obligation to undertake other actions. Again, the parties were not engaging in wasteful bargaining or futile agreements. They intended to express different objectives by the two conjunctive clauses when they included both; and they intended and agreed to exclude the one calling for a duty to discipline when they did exclude it in a series of subsequent agreements.

(2) The Parties' Deletion of Express No-Strike and Related Clauses Confirms Their Intention Not to Impose Liability Upon the UMWA for Wildcat Strikes.

The parties' deletion of previously existing no-strike clauses in contemplation of the Taft-Hartley Act in 1947 further reflects their intention strictly to limit any UMWA liability for wildcat strikes, and further explains why the inclusion of very explicit language was considered a prerequisite to the creation of any duty to discipline in the 1950 negotiations. In 1947, the coal industry and the

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For casting the claimed duty so broadly, as the industry is now urging this Court, may be to categorize the disputes and claims of liability and disciplinary duty by the International as "national in character" and therefore not subject to the grievance procedures commencing at the individual or local level, but only to "free collective bargaining . . . without recourse to the courts." At the very least, this language reflects the intentions of the parties that if and when a perceived problem arose, orderly collective bargaining rather than litigation would be the only means for imposing any obligation or duty upon the International grounded on principles applicable nationwide. cf. *Lewis* v. *Benedict Coal Corp.*, 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided Court and modified in part, on other grounds,* 361 U.S. 459 (1960).

UMWA engaged in collective bargaining for a new national agreement and the Taft-Hartley Act which was about to take effect was very much in their minds. See *International Union, UMWA* v. *NLRB, supra,* 257 F.2d at 216-17. There can be no question that they were in agreement that the liabilities and obligations of the UMWA with respect to strikes should be curtailed and eliminated so far as possible.

The keystone provisions embodying this general intention were repeals of previously existing no-strike and related clauses: "Any and all provisions in [previous national agreements] containing any 'no-strike' or 'penalty' clause or clauses or any clause denominated 'Illegal Suspension of Work' are hereby rescinded, cancelled, abrogated and made null and void." A. 150 (1947); A. 152 (1950); A. 178 (1968); A. 186 (1971).

To be sure, some decisions have held that a no-strike obligation is to be implied under certain circumstances, *E.g., Gateway Coal Co.* v. *UMWA,* 414 U.S. 368 (1974)[12]; *Lewis* v. *Benedict Coal Corp.,* 259 F.2d 346, 351 (6th Cir. 1958), *aff'd in part by evenly divided Court and modified in part, on other grounds,* 361 U.S. 459 (1960). But *Benedict* and other cases following it explain clearly why the propriety of implying a no-strike clause does not support imposing upon a union by implication the kind of obligation claimed by Carbon to exist here.[13] As *Benedict* explained, the abrogation of an express no-strike provision was not rendered meaningless by implying a no-strike obligation with respect to disputes the parties agreed would be set-

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[12] In *Gateway,* unlike this case, the UMWA supported the actions taken at the local level.

[13] Generally, "a provision should not be found by 'implication' when the testimony convincingly shows that such a provision was intentionally omitted. . . ." 3 *Corbin on Contracts* 298 (1960); *Gluckman* v. *Holzman,* 53 A.2d 246, 249 (Del. Ch. 1947).

tled in the grievance process, precisely because the abrogation still served the purpose of insuring that the International "remained free from liability for spontaneous or 'wildcat' strikes" 259 F.2d at 351. As similarly stated in *Old Ben Coal Corp.* v. *Local 1487, UMWA,* 457 F.2d 162, 164-165 (7th Cir 1972):

> "Implying a no-strike obligation in the 1968 agreement does not render the express abrogation of previous no-strike clauses meaningless as then-Circuit Judge Stewart indicated in [*Benedict*]. By virtue of that language, the Union has preserved the right to strike with respect to all disputes not subject to settlement by other methods made exclusive by the agreement. *In addition the language protects the Union from liability for spontaneous or 'wildcat' strikes . . .*" (emphasis added).

Accordingly, the parties' intention is clearly established: The UMWA is not to be liable for wildcat strikes; and in particular it has no obligation to discipline strikers.

B. The Parties Incorporated in Their Successive Agreements After These Contract Changes Judicial Gloss that There Was No UMWA Liability for Wildcat Strikes Nor Any Implied Duty to Discipline.

In their successive negotiations, the parties were not in the dark as to how Courts would interpret the pertinent language in their collective agreements. Within a few years of the foregoing fundamental changes in contract language, and against the background of the bargaining history recounted above, several appellate decisions confirmed that the UMWA indeed was *not* liable for unauthorized local stoppages. There was no suggestion that any duty to engage in discipline bound either party, and in particular no

apparent conception or contention that liability could be based on failure to take disciplinary action.

In the 1955 decision of the Fourth Circuit which that Court relied upon in the decision below, *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872, 877 (4th Cir. 1955), *cert. denied,* 350 U.S. 847 (1955), the holding was:

> "There is nothing in the contract making defendants liable for 'wildcat' strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in 'wildcat' strikes lose the protection of the [National Labor Relations Act] and may be discharged by their employers with impunity for so doing. *N.L.R.B.* v. *Draper Corporation,* 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability."

In 1958, interpreting the Agreement even as it existed from 1950 to 1952, the Sixth Circuit reasoned that in light of "the express abrogation of a no-strike clause in the 1950-52 agreement," the UMWA "remained free from liability for spontaneous or 'wildcat' strikes." *Lewis* v. *Benedict Coal Corp., supra,* 259 F.2d at 351. Likewise, in 1958, the District of Columbia Circuit also approved the construction of the bargaining history urged above. *International Union, UMWA* v. *NLRB, supra,* 257 F.2d at 216-17.[14]

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[14] The penury of Carbon's argument on the bargaining history is revealed by its sole reliance (Carbon Br. 30-35) upon an NLRB decision (117 N.L.R.B. 1095) which was overturned by the Court of

Similarly, a decision current at the time of the 1971 negotiations held that in light of the bargaining history, UMWA contracts cannot "be read as imposing liability upon the International Union for spontaneous or wildcat strikes in which it had no part by way of causing or prolonging such strikes." *Blue Diamond Coal Co.* v. *UMWA*, 436 F.2d 551, 556 (6th Cir. 1970), *cert. denied*, 402 U.S. 930 (1971).[15]

Consequently, the parties were very far indeed from writing on a clean legal slate when they negotiated and executed the 1968 and 1971 agreements. Quite to the contrary, they were then fully aware that courts had interpreted the contract language as changed in 1947 and 1952, and reiterated to identical effect in every agreement thereafter. The parties well knew that the courts had interpreted the language, against the background of deliberate deletion of prior language which imposed broader no-strike obligations and specifically established a duty to discipline, as freeing the UMWA from liability for local wildcat strikes. As these contract terms were repeatedly readopted thereafter, and as they stood in the 1968 and 1971 Agreements, the intention of the parties was embodied in that language, and correspondingly the legal force of that language, carried with it this judicial gloss. "Like other contracts, it [a collectively bargained agreement] must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956).

The law relating to the 1968 and 1971 Agreements when they were made plainly rejected UMWA liability for wildcat strikes. Even if areasonable argument could have been made in 1952 that a duty upon the UMWA to invoke disciplinary measures existed in the general

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Appeals, 257 F.2d 211, and which does not even support it on the pertinent issue. The very trial examiner's Intermediate Report in that case upon which Carbon relies (Br. 31, n. 1), see 117 NLRB 1094, 1099 (1957) reflects acceptance of the following explanation by UMWA counsel of the 1952 deletion of the "best efforts" clause (*id.* at 1115, n. 22):

> ". . . [A] lot of people want to use their own judgment as to what is the best effort that a representative of the Union, or an officer is, and those people are the ones that are in opposition to the Union and . . . they think that the way to solve these things is to put the men out of the Union, or to take away all the rights they have. The Union doesn't think that that's the proper thing to do, and they think, as a matter of fact, that it is a most ridiculous thing to get them back to work, because they would lose whatever control or power of persuasion that they have.
>
> "Maybe operators think that if they can get them out of the Union and they get them back under their prerogative, so to speak, so they can fire them, or throw them out, or throw them out of their company houses, or do whatever they wish to, they can beat them back to work and that may be the best thing for them. The Union is not going to do that, and when they wrote the 'best efforts' clause in there they weren't undertaking to do anything like that, and that is why it was taken out in 1952."

The Report stated (*id.* at 1118) that the deletion of the clause is significant to the extent that "the Union did not want to be told by others of the disciplinary action, if any, it must take against its own members to force them back to work." In short, the Trial Examiner's Report supports the UMWA rather than industry on the subject of whether any duty to discipline arises from the agreements at issue.

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[15] Indeed, the *Haislip-Benedict* application of the Agreements was faithfully followed by the Courts of Appeals until a very recent apparent departure by the Third Circuit in *United States Steel Corp.* v. *UMWA*, 534 F.2d 1063, *rehearing denied*, 534 F.2d 1084 (3rd Cir. 1976). *See, e.g., North American Coal Corp.* v. *Local 2262, UMWA*, 497 F.2d 459 (6th Cir. 1974); *Peabody Coal Co.* v. *Local 1734, UMWA*, 543 F.2d 10 (6th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *cf. Old Ben Coal Corp.* v. *Local 1487, UMWA*, 457 F.2d 162, 164-65 (7th Cir. 1972).

"settlement of disputes" and "integrity of contracts" terms—and we submit that it could not, even then—it would dislodge the parties' intention and arbitrarily rewrite the contracts to accept any such contention over a score of years later, after the parties had reiterated their adoptions of the language in full view of the contrary judicial constructions.

> "But even if, as an original matter the language of the disputes clause might have been susceptible of the interpretation urged by the Government, the restrictive meaning of the words 'arising under this contract' had long since been established when these parties used them in 1953. The question before us is what the parties intended, not whether the construction on which they relied was erroneous." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 407 (1966).

What the parties intended is that neither should have any duty to discipline for contract violations, and that in particular the UMWA should not have any liability for wildcat strikes. That is the only conclusion sanctioned by the pertinent contract language and its judicial interpretation, and the bargaining conduct of the parties.

C. Carbon Would Have This Court Grant It by Implication a Guarantee Against Wildcat Strikes Which It Did Not and Could Not Have Won in Collective Bargaining.

The bargaining history refutes Carbon's position that a duty to discipline should be implied as a facet of the parties' intention in the 1968 and 1971 agreements. It demonstrates that the parties recognized that their agreement upon any such duty, when they had actually reached it, must be spelled out in the contract.

In addition, Carbon's position is so unabashedly bold and extreme that its acceptance would leave Carbon a

wider range of actions against the Union, when the collective agreements have deliberately omitted and repudiated any indemnity, best efforts, or disciplinary action provisions, than an employer whose agreements included circumscribed clauses of this character, for example, requiring the Union to indemnify the employer in some instances for damages due to wildcat strikes. A great variety of "no-strike," "indemnity" and similar clauses, of varying breadth, have existed from time to time in collective bargaining agreements. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv.L.Rev. 274, 306-08 (1948). The narrowing of such clauses, or their omission, is a device, of which "[t]here can be little doubt of the effectiveness . . . of guarding a union against a potentially crushing liability." *Id.* at 309. The Senate Committee considering what became the Taft-Hartley Act indeed viewed the inclusion of even a no-strike clause as "a point to be bargained over." S. Rep. No. 105, 80th Cong., 1st Sess. 18 (1947); Cox, *supra*, at 309. Carbon would invert this reasoning, and by implication alone afford management the broadest conceivable rights, and place upon the UMWA the most onerous duty, precisely where no-strike clauses were deleted entirely and other clauses were greatly narrowed. This is patently impermissible. There is "no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB*, 394 U.S. 423, 433 (1969).

2. THE FUNDAMENTAL OBJECTIVE OF THE NATIONAL LABOR POLICY, FREE COLLECTIVE BARGAINING, IS SERVED BY THE DECISION BELOW AND WOULD BE FRUSTRATED BY REVERSAL OF THAT DECISION.

A. The Fundamental Objective of the National Labor Policy is Free Collective Bargaining Between Strong and Democratic Unions and Employers, Each Party Independent of Internal Interference from the Other.

Free collective bargaining is the fundamental national labor policy. Terms and conditions of employment and production where workers are organized are to be established and administered by collective bargaining, and not by the dictate of the employer or the Government. For the most part, each of the parties to collective bargaining, the management and the union as collective spokesman for the employees, is free to organize and operate independently and take whatever action is necessary in its own interest; the national labor policy is to qualify this freedom only so far as is necessary to regulate particular practices perceived to be abuses and to maintain fairness and rough equality of the relative potential strength of the parties.

This labor policy has been declared and enforced in our law at least since the adoption in 1935 of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C. §§ 151 *et seq.* ("NLRA"). The very purpose of that Act was to further the organization of employees so that labor could be a stronger party, independent of employer interference, to collective bargaining. To be sure, a hoped-for result was a mitigation of labor disputes and work stoppages. That result was to be achieved not by outlawing of such disputes and stoppages, but by eliminating the causes: the denial of "the right of employees to organize"; the refusal "to accept the procedure of collective bargaining"; the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151. The means adopted by the Congress, the purpose and policy of the Act, was "restoring equality of bargaining power between employers and employees" and "encouraging the practice and procedure of collective bargaining. . . ." *Ibid.* This policy was basically reiterated

when Congress amended the Act in the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.* ("LMRA"), which was essentially directed against certain union practices relating to the employment relationship; this was adjudged helpful to the basic policy of free collective bargaining, which was reaffirmed. *E.g., American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 316-17 (1965); *Local 24, IBT* v. *Oliver,* 358 U.S. 283, 295-96 (1959). The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), directed against certain union practices vis-a-vis individual members, likewise reiterated that collective bargaining is the basic labor policy. 29 U.S.C. § 401(a).

The "fundamental premise" upon which our labor legislation is based is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970). In the NLRA Congress "recognized from the beginning that agreement might in some cases be impossible." *Id.* at 103. And in 1947 Congress added Section 8(d) to the NLRA expressly declaring that the statutory duty of bargaining collectively "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d); *NLRB* v. *American Nat'l Ins. Co.,* 343 U.S. 395, 402-04 (1952).

B. Requiring the Union to Discipline Its Members and Locals, and Subject Itself to Liability for Wildcat Strikes Would Contravene the National Labor Policy by Weakening the Union, and Tilting the Bargaining Advantage Towards the Industry, in Contravention of Well-Established Legal Principles.

In the service of the national labor policy of free collective bargaining, the law must be and has been sensitive

to avoid unwarranted weakening of either of the bargaining parties. In particular, both Congress and the Courts have been scrupulous to avoid financial debilitation of unions as the collective representative of individual employees by extensions of union liability.

1. Imposing Liability by Implication Upon the UMWA Disregards Long-Established Legal Principles Strictly Limiting the Circumstances Under Which International Unions May be Held Liable for Conduct of Their Members or Locals.

The rule of automatic UMWA liability for wildcat strikes, for which Carbon and the industry are contending in this case, disregards the clear distinction between parent unions on the one hand, and local unions and the membership on the other hand, which the law has long recognized and preserved. There is no automatic liability on the part of the parent unions for the activity of the members or locals any more than there is automatic liability for a parent corporation for the wrongs committed by its subsidiaries. Zealously have the Courts and the Congress preserved this distinction.

Over a half-century ago, in *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922), this Court declared that a parent union is not vicariously liable for the alleged wrongdoing of local bodies absent actual ratification or authorization of that wrongdoing, and that the general power of the parent to discipline local organizations does not support vicarious liability. The *Coronado* rule has been followed faithfully. *E.g., North American Coal Corp* v. *Local 2262, UMWA*, 497 F.2d 459, 466-67 (6th Cir. 1974):

> "It has been clear to Congress for many years that imposition upon unions of vicarious liability for the unauthorized acts of individuals could easily mean the elimination of labor unions as a social institution in America . . .
>
> "Irresponsible or violent acts by individual workers (or by agents provocateur) if automatically attributable to the union on the scene could, of course, serve to destroy it. But such vicarious liability is repugnant to due process of law. And this circuit has repeatedly recognized that unions may only be held responsible for authorized or ratified actions of [their] officers and agents. . . .
>
> "In each of these cases this court recognized that *where a union did not call, authorize, or encourage a strike, and, on the contrary employed its authority to oppose it, no liability for an unauthorized or wildcat strike could be attributed to the union.*" (emphasis added; footnotes omitted).

Accord, W. L. Mead, Inc. v. *International Brotherhood of Teamsters*, 126 F.Supp. 466 (D. Mass. 1954), *aff'd*, 230 F.2d 576, 584 (1st Cir. 1956) (duty of union was "not to call a strike"), *cert. dismissed*, 352 U.S. 802 (1956); *United Construction Workers* v. *Haislip Baking Co., supra.* The National Labor Relations Board also has recognized that:

> "The overwhelming weight of judicial authority, including the Supreme Court of the United States, is that a local union is a legal entity apart from its international and that it is not a mere branch or arm of the latter . . . . That, too, has been the position of the Board . . . ." *Franklin Elec. Constr. Coop.*, 121 NLRB 143, 145-46 (1958).

Congress first acted to insure against automatic imputation of liability for acts of members or locals upon the parent union in the 1932 Norris-LaGuardia Act, 47 Stat.

70, 29 U.S.C. §§ 101 *et seq.* Section 6 of the Act, 29 U.S.C. § 106, required "clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof," before a labor organization could be held liable for the acts of individual officers, members or agents. The "driving force" behind its adoption was "the fact that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." *UMWA* v. *Gibbs,* 383 U.S. 715, 736-37 (1966).

The standards of the Norris-LaGuardia Act were "more stringent" than those of "ordinary doctrines of agency." *Id.* Congress elected to move the standards to general agency principles in 1947, when the Labor-Management Relations Act, 29 U.S.C. §§ 141 *et seq.,* became law. Section 301(b) and (e) of that Act provided that a labor organization "shall be bound by the acts of its agents" and that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §§ 185(b), (e). The Congressional intention was to "apply the ordinary rules of the law of agency to labor organizations." *Haislip, supra,* 223 F.2d at 879.[16]

[16] One commentator, in characterizing the *Haislip* decision as "sound" stated as follows:

> "As a matter of good sense, there are very sound reasons for a narrow concept of union liability. The union bargains for all employees in an appropriate unit, but it does not necessarily have the loyalty of all employees. Even in a union shop, the willingness to follow union leadership on economic questions, as well as matters of discipline of individual employees, may be of varying degrees and intensity. The union may not even be in a position to discipline employees who are nonmembers. And it is somewhat extreme to hold the union liable for damages when it takes a position opposite to that taken by the striking employees and does not encourage the strike."

Gould, *The Status of Unauthorized and "Wildcat" Strikes Under The National Labor Relations Act,* 52 Corn.L.Q. 672, 701-02 (1967).

Although the House Bill, as passed, would have abolished the Norris-LaGuardia Act including Section 6, in Section 301 suits,[17] the conferees rejected that approach in favor of the present Section 301. See H. Conf. Rept. No. 510, on H.R. 3020, p. 66; also 93 Cong. Rec. 6603 (1947) (Sen. Taft) ("The conferees . . . rejected the repeal of the Norris-LaGuardia Act"). Senator Taft noted (93 Cong. Rec. 6680) that "All this proviso does is to determine the question whether an agent of a labor union should have applied to him the ordinary common law rule of agency" and that the decision in *Carpenters* v. *United States,* 330 U.S. 395 (1947), "apparently led to the conclusion that a man who was clearly an agent under all rules of agency was yet not considered an agent of a labor organization." Senator Taft also stated that Section 301 merely imposed on a union "the same responsibility that a corporation has which is engaged in business." 93 Cong. Rec. 7690 (1947). He rejected as unjustified by the text of the bill and its background the *in terrorem* arguments of opponents of the bill that it could bring broad liability to international unions for action of local union representatives. 93 Cong. Rec. 7000 (1947).[18]

[17] H.R. 3020, § 302(e), 80th Cong., 1st Sess.; 1 Legislative History of the Labor Management Relations Act, 1947, p. 222 (GPO 1948).

[18] Two opponents of the Taft-Hartley Act, Senator Kilgore and Pepper, expressed fears in the debates on the conference version of the bill that the "agency" provision of § 301 might allow an

As Professor Cox noted in a leading contemporaneous article on the subject:

> ". . . it is clear that [Section 301 does] not impose on labor unions a responsibility beyond that imposed by the normal rules of agency . . . Consequently, just as a corporation ordinarily is not liable for the acts of a stockholder, so recognition of a labor organization as a juristic personality prevents imposing liability on it for the acts of its members.
>
> ". . . in dealing with local affairs, including local strikes and boycotts, a local union ordinarily acts a separate entity in pursuit of its own affairs."

Cox, *Some Aspects of the Labor-Management Relations Act,* 1947, 61 Harv.L.Rev. 274, 310, 312 (1948). Professor Cox noted that at the hearings, "Senator Taft took the

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international union to be sued "for something done by one of its local union representatives" and that such actions "might wreck the entire treasury" of the international. 93 Cong. Rec. 6680, 6681, 6689 (June 6, 1947).

A few days later, Senator Taft stated, in response, that "in the course of the debate on the conference agreement on H.R. 3020 a number of arguments directed at specific provisions of the bill were made on the floor which were not justified by either the text of the bill or the background of statutes and decisions against which it was written. In addition, numerous completely erroneous statements were made with respect to the effect of certain portions of the bill." 93 Cong. Rec. 7000 (June 12, 1947). To correct these statements, Senator Taft submitted a "supplementary Analysis of Labor Bill as Passed", which noted that the bill "restores the law of agency as it has been developed at common law", and noted the intent to avoid the result of the *Carpenters* majority. With respect to agency provisions of § 301, the referenced "erroneous statements" in the debates, could only have been those of Senators Kilgore and Pepper concerning potential expansive liability of international unions.

position that an international union would ordinarily not be liable for a wildcat strike by a local union." *Id.* at 312.[19]

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[19] A colloquy between Senator Taft and Mr. Patterson, General Counsel for the Rubber Workers Union, which took place in the 1947 hearings provides a unique insight into the application of the ordinary rules of agency of § 301(e) to the question of the "responsibility" of an international union for an unauthorized strike participated in by one of its locals. Mr. Patterson began the colloquy by relating an incident where the international union was being held responsible for clearly unauthorized strikes of the local union although, in an almost identical factual pattern to the *Haislip* case, a representative of the parent union had directed the local members to return to work and had disavowed the strike.

> "CHAIRMAN: [Senator Taft] In such a case as you describe, Mr. Patterson, you would be better off with this Act because it says here "any labor organization . . . shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization."
>
> MR. PATTERSON: Oh, no. We would not, Senator.
>
> THE CHAIRMAN: Under that, it seems to me you could not be liable in the case you have just put.
>
> MR. PATTERSON: I do not think that would save us in this situation at all, because an agent or a representative may be acting within the apparent scope of his authority and yet directly contrary to what the international officers told him. True, we did not fire him but firing a representative after we have a suit on our hands is not going to do us much good.
>
> THE CHAIRMAN: Well, I should think though that is mainly a matter of ordinary law. I do not see how you could be liable in any such case, nor how any bill could make you liable where your subordinate organization acted contrarily to your direction as you have expressed the situation.
>
> That would be like an agency case involving selling where someone who is holding himself out as having authority whereas, he did not have that authority. I would think that you are safe enough.

Hearings on S. No. 55, Sen. Labor and Public Welfare Comm., 80th Cong., 1st Sess. p. 1539, 1544, 1550-51 (1947).

Accordingly, the Congressional purpose was to focus attention, not merely upon whether the "specific act" was authorized or ratified, but also whether that class of acts *generally* was authorized or ratified. The legislative test thus shines the spotlight upon the general condemnation of the UMWA of striking over matters which might be submitted to the contractual disputes settlement procedure and its actions generally directed to end such strikes. That is even more probative than its disavowals of, and refusal to authorize or ratify, these strikes.

In the UMWA, the calling of a strike is *not* within the usual duties of local union members or officers, and cannot be said to be within the scope of their authority, or in the furtherance of the UMWA's interests—the usual tests of vicarious liability.[20] Rather, it is a function reserved to the International (*see* A. 121, 188-93). And, far from such prohibited actions "furthering" some interest of the UMWA, its own policy statements note that "[u]nauthorized strikes cause unnecessary loss of earnings to our members, work hardship upon their families and are not beneficial to the interests of the communities wherein they occur" (A. 190), and otherwise damage the Union. This general UMWA position was acted upon in this case. Each of the stoppages here was promptly disavowed by the UMWA which bent its efforts to having the strikers return to work. On this record, the conduct of the wildcat strikers cannot be vicariously attributed to the UMWA conformably to the applicable law.

[20] Indeed, it is farfetched to view the local members or officials as acting as "agents" of the International in any sense when they simply walk off the job. The Third Circuit's recent "imputed" liability decisions have been justly criticized as a departure from usual agency rules. *Note*, 89 Harv.L.Rev. 601, 607-10 (1976).

2. Extending Liability Beyond Those Who are Participating in (or Authorizing or Ratifying) the Strike and Not Mobilizing the Grievance Procedure Would be Unjust and Would Discourage the Adoption or Continuation of Arbitration Procedures in the Coal Industry.

Inasmuch as the UMWA neither participated in, authorized nor ratified the strikes which are accordingly "wildcat" strikes, there is no justification for imposing liability on it; and any such imposition would discourage the incorporation of arbitration clauses in the coal industry and similar collective bargaining relationships. The purpose of requiring and encouraging resort to the contract grievance procedure rather than strikes is served by the present remedies available to the employer of discipline, injunction or other legal action addressed precisely to those who are striking and their Locals to the extent they are involved.[21]

To extend that remedy beyond those who have made the election of striking rather than resort to the grievance procedure is patently unfair. This is not an area for guilt by association. To the eye of the law, as we have seen, the International and the Districts are different legal entities and personalities from the locals and the members.[22] It is

[21] The Court below held the local unions liable on a theory that the "mass action" of its members is attributable automatically to the local. 582 F.2d at 1349-50. The correctness of that holding is not before this Court. However, the UMWA considers that "mass action" is a legally insufficient basis for imputing the actions of individuals to a local union; and reserves the right to bring it before this Court at the appropriate time.

[22] *E.g., United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 878 (4th Cir. 1955), *cert. denied*, 350 U.S. 847 (1955); *Isbrandtsen Co.* v. *Nat'l Marine Engineers*, 9 F.R.D. 541, 544 (S.D.N.Y. 1940); Cox, *Some Aspects of the Labor-Management Relations Act*, 1947, 61 Harv.L.Rev. 274, 310, 312 (1948). This distinction also was followed in *U. S. Steel Corp.* v. *UMWA*, 598 F.2d

not the membership of the International or the District which has adopted the course of wildcat strikes in lieu of contractual disputes settlement procedure; it is only particular employees of Carbon. If the locals are to be held by the concept of the "mass action" of their members, that holding must be confined to the mass of membership involved. There is no justification for extending the finding of contract violation for liability in damages to the far broader groups of membership represented by the District and the International.

To subject the UMWA to liability without justification would inevitably discourage the adoption of grievance

363, 367 (5th Cir. 1979). There the Fifth Circuit held, correctly in our view, that "to succeed the Company would have to show that the District or International in some way also made itself a party to the strike"; *Id.* at 366, and that the Company had not shown "that either the District or International exercises such all-pervasive control over the local that the acts of the local may be imputed to the parent entity." *Id.* at 367. However, its opinion also contains *dicta*, unsupported by discussion, that "evidence of a past pattern of illegal strikes throughout the International membership is probative of complicity in this illegal conduct," and in a sympathy strike situation "where the International or District's greater ability to communicate with and control *both* sets of participants would suggest extending responsibility to the larger union entity." *Id.*

These *dicta* overlook the facts and legal considerations set forth in this Brief. There is no legal basis for allowing a trier to infer UMWA "complicity" from the mere existence of wildcat strikes, which result from deep-seated social causes beyond the UMWA's control. *See*, p. 5, n. 7, *supra*. Legal liability cannot be founded upon a bare assertion that its imposition would serve some useful purpose, even if that were true. Merely to assume that holding the UMWA liable would serve the purpose of stopping and preventing such strikes disregards not only the realities of wildcat strikes but also the decisive legal principles, grounded upon the agreements bargained and executed by the parties in historical fact and upon the general labor policy calling for the enforcement of such agreements, that preclude such liability.

settlement and arbitration procedures in collective bargaining agreements. Obviously, the UMWA would bend every effort and ounce of bargaining strength to obtain contract language which would rid itself of this liability, as indeed it believed it had done in the past. As a general matter, moreover, international unions would be inhibited from including arbitration clauses in their agreements, particularly in the case of bargaining units which are geographically extensive or multi-employee in which the membership is inherently difficult to control.[23]

There is no need to augment the remedies available to Carbon. As against the locals, as this case illustrates, Carbon remains free to invoke legal proceedings. As against the individual strikers, moreover, if Carbon genuinely believes that its employees are engaging in an illegal strike, it may discipline them. See, *Haislip, supra,* 223 F.2d at 877. For various reasons of its own interest it sometimes chooses not to do so: It may recognize, for example, that its own supervisors bear responsibility for the strikes; or in any event, it may not wish to subject itself to the kind of reaction which may ensue in the local community as well as the work force. Its concern for the loyalty and morale of the employees, or whatever reasons it has for eschewing disciplining its employees, only highlight its

[23] Federal labor policies favor multi-employer bargaining. *NLRB* v. *Brown,* 380 U.S. 278, 289 (1965); *NLRB* v. *Teamsters Local 449* (*Buffalo Linen*), 353 U.S. 87, 95 (1957); "Multi-employer Association Bargaining And Its Impact On The Collective Bargaining Process," Report of the General Subcommittee on Labor of the House Committee on Education and Labor (Committee Print, 1965). Such units are favored because they facilitate more efficient and meaningful negotiations and produce better contracts more effectively administered, thereby reducing contract strikes. To make automatic liability and discipline requirements the price the bargaining parent union must pay for such contracts, as the coal industry would like, is to subvert these policies.

desire in this case to gain bargaining strength by weakening the UMWA.

3. Holding the UMWA Liable for Wildcat Strikes Would Seriously Impair the Union's Ability to Represent the Employees Effectively.

The adoption of the ostensibly simple tests that the UMWA must take all "reasonable" steps or extend its "best efforts" to prevent wildcat strikes is to make the UMWA the guarantor of all industry losses from wildcat strikes. That is indeed the tenor of the Briefs for Carbon and its *amici*, their pervasive insistence that the UMWA should be held liable for all wildcat strikes. It is significant that the verdicts in this case which Carbon and the industry are seeking to reinstate inflict damages from the commencement of the strikes. That could rationally be done only on the theory that the UMWA is liable for failing to prevent these strikes.

If the industry prevails, there will be no case of a wildcat strike in which the UMWA will be free of potential liability. The utter vagueness and generality of the proffered standards will virtually insure that the industry will contend that the very occurrence or continuation of the strike *ipso facto* establishes liability.

The industry presumably believes that it will never be precluded from a large verdict, even if prior cases should result in exculpation of the UMWA for the identical actions or demonstrate the utter impracticability and ineffectiveness of whatever additional steps industry counsel could concoct. From the industry point of view, the great new benefit of these standards is that the UMWA will ever be on the defensive.

The only certainty, if this rule is adopted, is that the UMWA will be sued in every case of a wildcat strike and,

judging by this case, that substantial verdicts will be entered. The only "evidence" of the alleged absence of "best efforts" in this case was the bare fact that only disavowal and persuasive means were used, and discipline was not invoked, and that the strikes ended in a short time, usually within a day or two.

This Court has recently reiterated that the law and national labor policy establish that opening new gates to holding unions financially liable "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests." *International Brotherhood of Electrical Workers* v. *Foust*, —— U.S. ——, ——, 99 S. Ct. 2121, 2126 (1979). Although under some circumstances unions might be immunized from liability for a clear breach of the duty of fair representation by the *Foust* decision, that consideration is "insufficient to risk endangering the financial stability" of unions and "compromising the collective interests of union members in protecting limited funds." *Id.* at 2126-27. Like the allegations of liability involved in those cases, subjecting the UMWA to the award of damages contested for in this case "could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have." *Id.* at 2127. The very "threat of punitive damages could disrupt the responsible decisionmaking essential to peaceful labor relations." *Id.*

Identically, the threat of damages for wildcat strikes which the UMWA neither participated in nor authorized or ratified in any way not only could, but also inevitably would, disrupt the responsible decisionmaking and actions which the UMWA has actually undertaken in combatting such strikes.

4. Requiring the UMWA to Discipline Wildcat Strikers Would be Ineffective to End Such Strikes and Would be an Unwarranted Industry Intrusion in the Internal Affairs of the Union Upsetting the Balance Established by Existing Law.

Manifestly, the national labor policy of free collective bargaining assumes that there will be conflicting interests which are to be accomodated by the bargaining, different interests which are to be respectively served and promoted by each side independently of the other. There can be no genuine collective bargaining if the employer is free to dominate or interfere with the internal affairs of the union.

The basic policy that unions should be free from employer dictation of their internal rules and procedures has its clearest legislative expression in the NLRA's prohibition against employer dominance or interference with the formation *or administration* of any labor organization. 29 U.S.C. § 158(a)(2); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938).

The effort of the coal industry to dictate that disciplinary proceedings must be triggered by wildcat strikes, as an implied duty under contract language which expresses no such obligation, is all the more outrageous an attempt to circumvent this policy because the law would preclude the industry's insisting that the UMWA even bargain on the subject. The duty to bargain collectively extends to "the relationship between the employer and the employee" and does not extend to those matters dealing "only with the relations between the employees and their union." *NLRB* v. *Wooster Division, Borg-Warner Corp.*, 356 U.S. 342,

350 (1958).[24] Consequently, provisions designed to obtain enforcement of no-strike obligations are permissive subjects of bargaining. While a no-strike clause is itself a mandatory subject of bargaining, the employer may not insist that there be bargaining or agreement on particular means of enforcement such as indemnity clauses or guarantees.[25]

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[24] Carbon relies on Section 204(a)(1) of the LMRA, 29 U.S.C. § 174(a)(1), to support its claim of UMWA responsibility. That Section which appears in Title II of the Act, creating and defining the role of the Federal Mediation and Conciliation Service, merely reflects the legislative policy favoring good faith collective bargaining as a means of solving labor disputes. *See NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956;) *OCAW, Local 4-447* v. *American Cyanamid Co.*, 94 LRRM 3064, 3065 (E.D.La. 1976) (not officially reported). House Conference Report No. 510 on H.R. 5020 (1947) describes the purpose of § 204, as follows:

> "Section 204 of the Senate amendment stated that it should be the duty of employers and employees, and their representatives, to exert every reasonable effort to settle their differences by collective bargaining, and, if this should fail, to utilize the assistance of the Mediation Service. This provision is also included in section 204 of the conference agreement, but there has been omitted therefrom language which appeared in the Senate amendment which indicated that the parties were under a duty to submit grievance disputes to arbitration."

Carbon's effort to invoke this extremely general provision having a purpose not related to the matters at issue here, in aid of its contention that a specific duty to discipline union members inheres in the collective bargaining agreements in the coal industry, is baseless. In any event the parties went far beyond any requirement of § 174(a)(1) in this regard, by bargaining over the matter of their responsibility, or lack of it, to discipline. See pp. 15-25, *Supra.*

[25] In *Borg-Warner*, this Court held that "recognition" or "ballot" clauses are permissive subjects of bargaining because they regulate the relations between the employee and the union. Following that rationale, the National Labor Relations Board has held that employer demands for union processes to secure the performance of no-strike clauses are permissive subjects of bargaining

If such vague but all-embracing standards as "reasonable steps" or "best efforts" are decreed as the industry demands, how can the UMWA possibly know in advance how to satisfy them? There is no way, as the industry is well aware. But it has a particularly insidious answer, which appears to be the stakes for which it is playing in this case, that the failure of the UMWA to take disciplinary action against individual members or local unions who are engaging in wildcat strikes will in effect be an irrebuttable presumption that the tests have not been satisfied and that the UMWA is liable. This most clearly emerges in the Brief of Bituminous Coal Operators' Association, Inc., as *Amicus Curiae* in Support of the Position of Carbon Fuel Company ("BCOA Br."). That Brief sets out the industry's position as to what further action the UMWA allegedly could have taken to defeat liability in this case for strikes which it disavowed and took all steps which it regarded as reasonable and effective to terminate. The industry reply is that in this case "the evidence also showed that neither the International, District 17, nor any of the Local Unions took any disciplinary action or other steps to prevent or end the strikes." (BCOA Br. 11). An accompanying footnote refers to the provisions under the UMWA Constitution for discipline of local unions and individual members. *Id.* at n. 4. That footnote continues to be refer-

—whether in the form of either indemnity bonds, *Carpenter's District Council of Detroit (Excello Drywall Co.)*, 145 NLRB 663 (1963), *enf'd* 58 LRRM 2064 (D.C. Cir. 1964), unsecured indemnity agreements, *NLRB* v. *Davison*, 318 F.2d 550 (4th Cir. 1963) *enf'g sub. nom. Arlington Asphalt Co.*, 136 NLRB 742 (1962); *Hall Tank Company*, 214 NLRB 995 (1974), or even liquidated damages, *Beyerl Chevrolet, Inc.*, 221 NLRB 710 (1975). This is true, even though, as the Board has recognized, the no-strike clause and an additional agreement to secure its performance are undoubtedly " 'entwined.' " *NLRB* v. *American Compress Warehouse*, 350 F.2d 365, 369 (1965), *enf'ing* 144 NLRB 433, 438 (1963), *cert. denied*, 382 U.S. 982. (1966)

enced for statements that the International and the Districts "have utterly failed and refused to exercise their authority to utilize *any* of the means available to them", *id.* at 21 n. 10 (emphasis added), that there is "an array of legitimate methods at the Union's disposal", *id.* at 39, n. 35, and, in reiteration, that the UMWA has the authority to impose sanctions upon wildcat striking locals and members, *id.* at 45, n. 40.

The industry would presumably have this Court believe that imposing this duty to discipline would eliminate wildcat strikes. In fact, it would not; and in any event, it is alien to the national labor policy that free collective bargaining, not authoritarian practices, in the long run will better preserve industrial peace as well as the other values of a free society.

At the trial, Carbon presented no evidence—doubtless because it had none—that invoking disciplinary proceedings would have prevented or shortened any of these strikes. Nor does the industry proffer any evidence or factual support for the implicit assumptions that imposing this duty on the UMWA would preclude or foreshorten wildcat strikes. On the other hand, the record in this case evidences that disciplinary measures are counterproductive. They breed such resentment that they are far more apt to harden attitudes and prolong a strike, or make it inevitable as a show of independence, than to curtail or prevent it. The industry insists upon its freedom and discretion to determine in every case whether to discipline employees, but it desires to straightjacket that discretion and freedom for the other side of the bargaining table, the UMWA.

The industry position is not only unfair but also unrealistic. The employer-employee relationship is inherently authoritarian and undemocratic. Contrastingly, a voluntary membership organization such as the UMWA is not,

in our society, a rigid, authoritarian institution with iron control over its members. To the contrary, the aim of public policy with respect to labor organizations, as embodied principally in the LMRDA, is to insure that labor organizations not be authoritarian; that democratic opposition be allowed to develop within them; and that discipline not be inflicted upon members without cause or without following procedures which provide due process. As is well documented, these goals indeed have been advanced in the United Mine Workers of America, after a long and difficult struggle, and autocratic leadership has been replaced through the electoral process. See generally, *Yablonski* v. *UMWA*. 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Hodgson* v. *UMWA*, 344 F. Supp. 990 (D.D.C. 1972), *affirmed sub nom; Brennan* v. *UMWA*, 475 F.2d 1293 (D.C. Cir. 1973); *cf., Trbovich* v. *UMWA*, 404 U.S. 528 (1972).

A concomitant of this increased democratization is that, by statute, a union cannot impose summary discipline upon alleged participants in wildcat strikes. Rather, discipline must be preceded by the making of specific charges, time to prepare a defense, and a full and fair hearing. 29 U.S.C. §411(a)(5). And the proceedings must conform to the Union's own rules, which require not only procedural safeguards at the trial level and prescribe several steps of appeal (UMWA Constitution, Article III, Section 3, Pl. Ex. 34), but which also demand proof "that any member or members were engaged in promoting, conducting or prolonging an unauthorized work stoppage" (International Executive Board Policy Directive, A. 189). In this respect, industry's "rendition of federal labor policy is simplistic and, in major respects, flatly wrong", for it "assumes that unions have plain authority to revoke membership, impose fines, suspend local officials, prevent employment elsewhere and otherwise punish wildcatters."

Whitman, *Wildcat Strikes: The Union's Narrowing Path to Rectitude*, 50 Ind.L.J. 472, 480 (1975).

There is thus no support for the factual assumption necessary to the industry's position that invocation of the disciplinary means at the disposal of the UMWA and the District would be more effective than either the persuasive methods it does use with considerable success or the employer's and the Court's powers to act much more summarily. Invocation of Union discipline is no panacea for eliminating wildcat strikes. See N. 7 pp. 5-6, *supra*.

Beyond doubt, imposing a flat requirement that the UMWA must discipline members and locals who are engaged in wildcat strikes would generate discord among the membership and inevitably diminish the bargaining power of the UMWA. The very institution and enforcement of such adversary proceedings would import discord and disunity, pitting members against members, and locals against the districts and the UMWA. There are bound to be disagreements, for example, as to whether or not the stoppages are justified and whether they are illegal.[26] The industry's position would foment litigation. It would result in innumerable damage suits brought by employers against the UMWA, during or after labor disputes which "would only tend to aggravate industrial strife and delay an early resolution of the difficulties between the employer and union." *See, Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970). Moreover, the industry position would spawn suits under the LMRDA, or based upon alleged

[26] This case itself illustrates the mischievous effects that would attend such a rule, for if the rule had been in effect prior to these strikes, Carbon would surely have contended that the UMWA and its Districts were absolutely bound to institute disciplinary proceedings against workers and locals who were engaging in what ultimately were held to be lawful strikes under *Buffalo Forge* and the decision below.

breach of the duty of fair representation, by members against unions. *See,* Whitman, *Wildcat Strikes: The Unions Narrowing Path to Rectitude,* 50 Ind.L.J. 472, 482-87 (1975).

Particularly since the automatic invocation of discipline might well be perceived as imposed at the behest and for the benefit of the industry, the confidence of the members that the Union can effectively serve their interests would be impaired. The highly visible result is that the Union no longer possesses a significant measure of its former freedom and discretion to act in their interests. The employer's position that the UMWA should be compelled to discipline them overstates the efficacy of such actions, as discussed above; and, more seriously, permits the employer to sow seeds of dissension between the Union and its members, and to exacerbate factionalism within the Union. See *Note,* 89 Harv.L.Rev. 601, 607-08 (1976); Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act,* 52 Corn.L.Q. 672, 702 (1967).[27]

> "A strict 'all reasonable means' standard deprives union leadership of flexibility to adjust to the political dynamics of a wildcat strike. The union should be allowed to judge whether severe sanctions will help bring the walkout to an end, or whether they would be counterproductive. Especially since wildcat strikes often are directed as much against the union leadership as against the employer, a union compelled to take drastic steps may lose is credibility with the wildcatters, and its further attempts to end the walkouts would be rendered ineffective. Similarly, administration of harsh disciplinary measures may execerbate factionalism within the union, thus undercutting support for the union leadership. Without this support, which is necessary to the scheme of exclusive representation, industrial stability may be threatened." Note, 89 Harv.L.Rev. 601, 607-608 (1976) (footnotes omitted).

[27] As Gould points out:

> "Furthermore, there may be groups within the unit which are hostile to the bargaining agent. Such groups may contain a contending faction or members of a rival union which would like to have the incumbent exposed to liability. Moreover, an employer-sponsored strike is certainly not beyond the realm of possibilty." *Id.*

If the industry can set Union Brother against Union Brother in internal disciplinary proceedings, it will corrode that unity which makes for bargaining strength on the Union side. It will divert Union activity and resources from serving the interests of the UMWA and District membership as against Carbon and the industry. It will shift the balance of bargaining strength now subsisting under law strongly in favor of the coal industry and against the UMWA. For this Court to sanction any such boon to the industry would disregard the bargaining history of the agreements and the conduct of the parties, and wreak a grievous disservice to the national labor policy.

VI. CONCLUSION

For the reasons stated herein, the Judgment below should be affirmed.

Respectfully submitted,

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